To the Court of Criminal Appeals:

Jordan Jones replies as follows to CCRI's brief:

> We cannot be influenced … by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly.[1]

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[1] *U.S. v. Playboy Entertainment Group, Inc.*, 529 US 803, 826 (2000).

CCRI's parade of horribles proves the point.

The first twelve pages of CCRI's brief comprise a parade of horribles, personal opinions, and "research" by the single-issue advocacy group, which, to the extent that they are even germane here, demonstrate the overbreadth of section 21.16(b).

Section 21.16(b) punishes speech that causes "harm"; that term includes "anything reasonably regarded as loss, disadvantage, or injury."[2] A defendant could be convicted of a felony if the disclosure caused annoyance or embarrassment, and did not cause any physical harm, financial harm, or emotional distress.

This is one of a panoply of reasons that the statute fails any scrutiny: it would be less restrictive if it punished only speech causing severe harm.[3]

Respondent is *accused of embarrassing the complainant*.[4] Quoting that accurate statement in Respondent's Brief, CCRI argues that

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[2] Tex. Penal Code § 1.07(25).

[3] Please see Respondent's Brief at 56.

[4] Respondent's Brief at 50. Lest this Court think that that is an aberration, the clerks' records in the pending cases of *Ex parte McGregor*, No. 01-18-00346; *Ex parte Ellis*,

Respondent's "[B]rief suggests Section 21.16(b) is addressed at preventing embarrassment," and argues that "CCRI's research shows that nonconsensual pornography creates significantly more harm than *mere* embarrassment [including] 'significantly worse mental health outcomes.'"[5]

CCRI cannot and does not argue that the *Information* charges any harm significantly greater than "embarrassment." Nor does CCRI argue that the *Information* accusing Respondent of embarrassing Complainant is insufficient to state a charge under Section 21.16(b). Instead, CCRI argues that disclosure of intimate images should be criminalized because it causes harm greater than embarrassment.

CCRI thus, unintentionally, makes clear that, at least in this respect, Section 21.16(b) is not "narrowly drawn." By seeking to defend the statute based on egregious conduct that could cause significant harm (which was not charged here) rather than trying to defend the criminalization of conduct that causes only "mere" embarrassment (which was) CCRI inadvertently demonstrates that the

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No. 10-17-00047-CR; *Ex parte Mora*, Nos. 01-17-00661-CR & 01-17-00662-CR reveal that all of those prosecutions involve only allegations of embarrassment.

[5] CCRI Brief at 32 (emphasis added).

statute is not "narrowly drawn" and is thus unconstitutional. Because section 21.16(b) is not "addressed at preventing embarrassment," it overreaches by punishing embarrassment.

***OSINGER* AND *PETROVIC* ARE OFF-POINT.**

CCRI relies on two cases rejecting challenges to the federal cyberstalking statute, 18 U.S.C. § 2261A(2)(A): *U.S. v. Osinger*[6] and *U.S. v. Petrovic*.[7] Those cases cannot be read to support CCRI's argument that non-consensual pornography is an unprotected category of speech.

While they happened to involve the nonconsensual publication of sexually explicit images, these cases are inapposite because the federal provision at issue in those cases, unlike section 21.16(b):

- prohibits a "course of conduct," not speech;
- does not favor one form of expressive conduct over another;
- requires that a victim be placed in fear of physical injury, or suffer or reasonably be expected to suffer "substantial emotional distress"; and
- requires that the defendant have malevolent intent.[8]

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[6] 753 F.3d 939 (9th Cir. 2014)

[7] 701 F.3d 849 (8th Cir. 2012)

[8] 18 U.S.C. § 2261A(2)(A).

These factors distinguishing section 2261A(2)(A) from section 21.16(b) were key to the facial challenges in both cases.[9]

Even if they said what CCRI wished, *Petrovic* and *Osinger*, both less than seven years old, would not be evidence of the "long tradition of proscription"[10] necessary to support recognition of an additional category of historically unprotected speech.

VANBUREN IS UNSUPPORTED BY SUPREME COURT AUTHORITY.

CCRI quotes the Vermont Supreme Court's *State v. Vanburen* for the proposition that "expression that invades individual privacy" is a category of speech outside the First Amendment's protection. The Vermont Court is out on a limb: no United States Supreme Court precedent supports that notion.

OTHER INVASIONS OF PRIVACY ARE NOT CONSTITUTIONALLY CRIMINALIZED.

CCRI writes of other laws protecting "medical records, trade secrets, social security numbers, or drivers' license information" from being disclosed. Respondent knows of no case in which the Supreme Court

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[9] *U.S. v. Petrovic*, 701 F.3d at 856; *U.S. v. Osinger*, 753 F.3d at 944.

[10] *United States v. Alvarez*, 567 U.S. 709, 722 (2012), *quoting Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 792 (2011).

has upheld the criminalization of any truthful invasion of privacy. To the contrary, the Court has resolutely declined to do so.[11]

CCRI MISCHARACTERIZES *MARQUAN* AND *BISHOP*.

In its footnote 105, CCRI mischaracterizes the rulings in New York's *People v. Marquan* and North Carolina's *State v. Bishop*.

In *Bishop* the court struck down the statute on overbreadth grounds because the intent terms were not adequately defined in the statute. It stated, "The protection of minors' mental well-being may be a compelling governmental interest, but it is hardly clear that teenagers require protection via the criminal law from online annoyance."[12]

In *Marquan*, the state conceded that the cyberbullying law was overbroad but asked the court to narrow it. The New York Court of Appeals declined to do so in part because speech about private sexual matters with intent to annoy or taunt the subject of the speech was not sufficiently malicious. "the First Amendment protects annoying and embarrassing speech."[13]

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[11] Please see Respondent's Brief at 52 n.107.

[12] *State v. Bishop*, 787 S.E.2d 814, 821 (N.C. 2016).

[13] *People v. Marquan*, 24 NY 3d 1, 11 (N.Y. 2014).

CCRI DOESN'T TELL THE WHOLE STORY ABOUT INTENT TO HARM.

CCRI notes that 42 states have enacted criminal statutes regulating the unauthorized disclosure of intimate images,[14] and then, citing the laws of only *three* states,[15] notes that "several state laws" do not include intent to harm as an element of the offense.[16] CCRI's careful wording avoids stating the obvious: A significant majority of the states addressing this issue include "intent to harm" as an element of the offense. Texas is in a small minority that do not do so.

CCRI'S INTERMEDIATE-SCRUTINY ARGUMENTS ARE ILL-FORMED.

To argue that Texas Penal Code § 21.16(b) should not be subject to strict scrutiny, CCRI:

(a) relies on *Young v. Am. Mini Theaters, Inc.*[17] without noting that the U.S. Supreme Court has specifically limited *Young* to "secondary effects" regulations, such as zoning cases;

(b) tears a quotation out-of-context from the U.S. Supreme Court's decision in *Davenport v. Washington Educ. Ass'n*,[18] and

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[14] CCRI Brief at 3

[15] Illinois, Minnesota, and Washington.

[16] CCRI Brief at 28.

[17] *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50 (1976).

[18] *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007).

(c) fails to incorporate the learning found in recent U.S. Supreme Court cases, including *United States v. Alvarez*,[19] *Brown v. Entm't Merchs. Ass'n*,[20] and *United States v. Stevens*.[21]

CCRI misrepresents Young.

Quoting *Young*, a zoning case, CCRI argues:

> The U.S. Supreme Court has also endorsed a reduced level of scrutiny for the regulation of sexually explicit material. As the Court has explained, even when sexually explicit material does not rise to the level of obscenity, the First Amendment offers such speech protection "of a wholly different, and lesser magnitude" than the protection it offers "political debate."[22]

Twenty-four years after *Young*, however, in *United States v. Playboy Entm't Grp., Inc.*[23] the U.S. Supreme Court held that *Young*'s language affording protection of a "lesser magnitude" to sexually-explicit speech was "irrelevant" except when evaluating zoning regulations and other "secondary effects" laws. The Court held:

> Our zoning cases, on the other hand, are irrelevant to the question here. We have made clear that the lesser scrutiny afforded

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[19] *United States v. Alvarez*, 567 U.S. 709 (2012).

[20] *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011).

[21] *United States v. Stevens*, 559 U.S. 460 (2010).

[22] CCRI Brief at 18-19 (footnotes omitted).

[23] United States v. Playboy Entm't Grp., Inc., 529 U.S. at 803.

> regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech. The statute now before us burdens speech because of its content; it must receive strict scrutiny.[24]

CCRI takes sound-bites out of context from Davenport.

CCRI's reliance on *Davenport* is similarly misplaced. Quoting *Davenport* out of context, CCRI argues:

> Generally speaking, it "is true enough that content-based regulations of speech are presumptively invalid." The U.S. Supreme Court has recognized, however, that "[t]he rationale of the general prohibition … is that content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." There are "numerous situations in which that risk is inconsequential, so that strict scrutiny is unwarranted."[25]

With that predicate, CCRI then goes on to argue that "strict scrutiny should not be applied to legal protections against the unauthorized disclosure of matters of private concern."[26]

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[24] *Playboy*, 529 U.S. at 814 (citations omitted).

[25] CCRI Brief at 17 (footnotes omitted).

[26] *Id.*

The quoted language does, indeed, appear in *Davenport*. But in the very same paragraph from which CCRI extracts its soundbites, the Court makes clear that the fact that "we [*i.e.*, the U.S. Supreme Court] have identified" situations in which strict scrutiny is unwarranted is not an open invitation to abandon strict scrutiny in other areas involving content discrimination. *Davenport* cites these areas in which content discrimination is not subject to strict scrutiny:

> For example, **speech that is obscene or defamatory can be constitutionally proscribed** because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas. *See, e.g., R.A.V. [v. City of St. Paul,]* 505 U.S. [377,] 382–384 [(1992)]. Similarly, content discrimination among various instances of a class of proscribable speech does not pose a threat to the marketplace of ideas when the selected subclass is chosen for the very reason that the entire class can be proscribed. *See id.,* at 388 (confirming that **governments may choose to ban only the most prurient obscenity**). Of particular relevance here, our cases recognize that the risk that content-based distinctions will impermissibly interfere with the marketplace of ideas is sometimes attenuated when the government is acting in a capacity other than as regulator. Accordingly, it is well established that **the government can make content-based distinctions when it subsidizes speech**. And it is also black-letter law that, when **the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the**

> **distinctions drawn are viewpoint neutral** and reasonable in light of the purpose served by the forum.[27]

Nothing in *Davenport* remotely suggests that strict scrutiny is limited to content-based discrimination that threatens to "drive certain ideas or viewpoints from the marketplace." Nothing there supports CCRI's argument that strict scrutiny should not apply here.

CCRI IGNORES MORE-RECENT CASES.

Moreover, in cases more recent than *Davenport*, the U.S. Supreme Court has made even clearer the breadth of the prohibition on content-based discrimination of speech. Thus, in *Reed v. Town of Gilbert*,[28] after stating, "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests,"[29] the U.S. Supreme Court went on to explain:

> [T]he crucial first step in the content-neutrality analysis [is] determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny

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[27] *Davenport*, 551 U.S. at 188 (emphasis added, some citations omitted).

[28] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015).

[29] *Id.* at 2226.

> regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech.[30]

It is only if, in this "first step in the content-neutrality analysis," the court determines that a law is content neutral on its face that the court goes on to consider the justification of purpose of the law to determine whether strict scrutiny should apply. If, in the first step, the court determines that the law is content-based on its face, the law is subject to strict scrutiny, without considering whether the law has a salutary purpose.

CCRI's argument that the Section 21.16(b)—undisputedly a content-based regulation—should not be subject to strict scrutiny because it is intended to protect privacy thus cannot be reconciled with *Reed*.[31] Because the law is, on its face, content-based discrimination, its purpose is not considered in determining whether strict scrutiny should apply.

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[30] *Id*. at 2228, *quoting Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).

[31] CCRI cites *Reed* in two footnotes, but makes no attempt to reconcile its own argument with *Reed*. CCRI Br. at 17 n. 51; 20 n. 66.

Nor can CCRI's argument be reconciled with *United States v. Alvarez*,[32] (the "Stolen Valor" case, in which the Court held unconstitutional a federal statute that criminalized lying about military honors), *Brown v. Entm't Merchs. Ass'n*,[33] (in which the Court held unconstitutional a California statute regulating the sale of violent video games), or *United States v. Stevens*,[34] (in which the Court held unconstitutional a federal statute criminalizing the sale of "animal crush" videos).[35] In those cases, the U.S. Supreme Court reiterated that—except for a few "historic and traditional categories of speech long familiar to the bar," including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, that "have never been thought to raise any Constitutional problem,"[36] "a restriction on the content of protected speech … is invalid unless [the government] can demonstrate that it passes strict scrutiny—that is, unless it is

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[32] *U.S. v. Alvarez*, 567 U.S. 709 (2012).

[33] *Brown v. Entm't Merchs. Ass'n.*, 564 U.S. 786 (2011).

[34] *United States v. Stevens*, 559 U.S. 460 (2010).

[35] CCRI cites *Brown* and *Stevens*, but makes no attempt to reconcile its argument with those cases. CCRI Brief at 20 n.66. CCRI does not cite or discuss *Alvarez*.

[36] *Stevens*, 559 U.S. at 468-69.

justified by a compelling government interest and is narrowly drawn to serve that interest."[37] The Court flatly rejected arguments—similar to those advanced by CCRI—that to determine whether the First Amendment protected speech, a court should "weigh[] the value of a particular category of speech against its social costs."[38]

THIS IS A FACIAL CHALLENGE.

CCRI's attack on the decision below for "resort[ing] to a contrived hypothetical rather than addressing the actual facts of the instant case"[39] ignores the fact that this is a challenge to the statute on its face, as written, in which it was the role of the lower court (as it is the role of this Court) to review the range of possible applications of this statute.

INDEX OF AUTHORITIES

SUPREME COURT CASES

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[37] *Brown*, 564 U.S. at 799.

[38] *Brown*, 564 U.S. at 792; *Stevens*, 559 U.S. at 469.

[39] CCRI Brief at 26.

OTHER CASES

STATUTES

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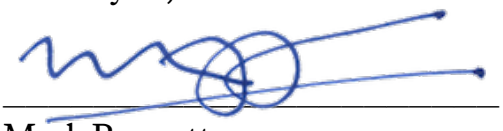

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